TAN KUP v. CHOP TEIK SENG LEONG

[O. C. J. (Bostock Hill J.) December 13, 1948]

[Penang — Civil Suit No. 126 of 1947]

Contract — Claim for damages for breach of contract — Question of damages — Nominal damages.

In this case the plaintiff sued the defendant firm for damages for breach of a contract to charter their motor boat for a voyage to Burma and back. It was found on the facts that the defendant firm were liable for breach of contract. On the facts the Court held it was difficult to ascertain what (if any) loss the plaintiff had suffered by reason of the breach of contract.

Held: as in this case the Court was unable to assess damages on any legal basis, judgment should be given for nominal damages for $1, and each party be ordered to pay his own costs.

Case referred to :--

(1) *Sapwell v. Bass* (1910) 2 K.B. 486.

CIVIL SUIT.

Lim Kheng Kooi for the plaintiff.

F. G. Pooley for the defendants.

Bostock Hill J. : — In this case the plaintiff sued the defendant firm for damages for breach of a contract to charter their motor-boat P. 2340 for a voyage to Burma (Rangoon) and back. The agreement is contained in Exhibit P. 3 and was signed on *21st October, 1947*. It was signed by the plaintiff for himself and by Tan Gie Chwan "on behalf of the said Chop Teik Seng Leong."

The plaintiff stated that he intended to carry a cargo of 84,930 coconuts and also a consignment of white pepper to Rangoon for sale there, and that, with the proceeds of such sale, he would buy goods in Rangoon and ship them back to Penang.

One of the partners in defendant firm (namely Tan Teik Seng) had died on 25th September, 1947 and, after his death there was a serious dispute between the remaining partners. A Writ in a Partnership Suit was issued on *22nd October, 1947* and on the same day an interim injunction was obtained prohibiting the firm's motor-boats (including the P. 2340) from leaving Penang. That injunction was not dissolved until 31st October, 1947 when a Receiver Tan Poh Choo was appointed by Order of this Court.

The plaintiff states that he did not at once know about the injunction being obtained but that it was explained to him that there was some internal trouble between the partners which could be settled, and so he was put off. Anyhow on *28th October, 1947* he instructed his Solicitor (Mr. Lim Kheng Kooi) to write to the defendant firm. That letter is on page 1 of the agreed bundle of correspondence Exhibit P. 2. In that letter is set out, not without exaggeration, the plaintiff's position, and it calls upon the defendants to hand over the P. 2340 within 24 hours.

On *29th October, 1947* the defendant's then Solicitor replied stating that there was an injunction against the vessel leaving Penang and asking plaintiff to wait before taking action.

On *3rd November, 1947* plaintiff's Solicitor wrote asking for a reply and stating that his client was not prepared to wait indefinitely.

On *4th November, 1947* defendant's Solicitor wrote an evasive letter asking for particulars of the goods to be exported to Rangoon. Plaintiff by then seems to have regarded his position as regards the chartering of the vessel as hopeless and he sold the perishable part of his cargo, according to his evidence, at a loss of $4,246.50, which sum he claims as damages.

On *18th November, 1947* his Solicitor wrote a letter to defendants' Solicitor claiming this sum and also the return of the $3,000 which plaintiff had paid in advance at the time of signing the charter-party.

The $3,000 was later returned to him and in this Suit plaintiff claims the $4,246.50 as damages.

Plaintiff gave evidence to the effect that he was a coconut dealer in a moderate way of business at Butterworth and that in September, 1947 he had sold coconuts to defendant firm through a man in their employ named Tan Gie Chwan. He appears to have regarded this Tan Gie Chwan as a person having authority in defendant firm and evidence was given to show that in the September dealings with the firm plaintiff had received 2 cheques signed by Tan Gie Chwan and "chopped" with the firm's Chop.

On *October 21st* he again dealt with Tan Gie Chwan who gave him a receipt for the $3,000 he paid in advance. This receipt, Exhibit P. 4 is signed by Tan Gie Chwan over the firm's Chop.

The plaintiff was cross-examined at great length by Mr. Pooley and this cross-examination showed clearly that he was not only illiterate (he could just sign his own name) but was also extremely stupid. Mr. Pooley sought to show that his story was so improbable and some of his statements so wild that no reliance could be placed on his evidence. It is quite true that he had the most unbusiness like way of carrying on his business, particularly with regard to his account books or the lack of them. His whole schemes of attempting to send coconuts to Rangoon was, as he himself said, "rather a gamble" and he seemed to have hardly any idea of what he was doing (or of what a friend was doing for him) with regard to the white pepper which, he stated, was to be part of his cargo to Rangoon. Also his dealings with Export Licences for his coconuts were rather vague.

Nevertheless I am of opinion that Mr. Pooley did *not* succeed in showing that the whole transaction was

a bogus or fraudulent one on plaintiff's part. I think the documents, Exhibits P. 5, P. 6, P. 7 and P. 8 are genuine and that plaintiff did buy the coconuts with intention of sending them to Rangoon. I came to this conclusion not only by reason of the plaintiff's evidence but also because I attach importance to the letter from his consignees in Rangoon (dated 9th October, 1947) Exhibit P. 13.

That letter came before the Court in a curious way. Plaintiff's own Counsel knew nothing about it and consequently it had not been disclosed before the case. Apparently plaintiff thought it of no importance and its existence only came to light when plaintiff was in the witness-box. He mentioned the existence of such a letter and said that it might be in his house, and during the luncheon adjournment he produced it from his house in Butterworth. I am of opinion that it is a genuine letter and its translation (certified) is as follows :—

Mr. Tan Kup of Chop Heap Lee.

9th day of the 10th month, 36th year of the Chinese Republic (9.10.47).

Dear Sir,

We feel much favoured when you stated in your letter received here some time ago, that you would be sending coconuts to Burma for sale on consignment by us.

Recently, we have sold for other firms husked coconuts at 40 rupees per sack of 100 nuts. The market is calm.

Government has recently proclaimed that hereafter AP will not be issued any further and that all AP issued previously will be valid up to the end of June next year.

Fortunately, we have previously obtained AP for 100 - 200 tons. On the arrival of your goods, you need not fear that there will be no AP for use. Lest you misunderstand, I have specially written again to inform you so that you may send as much as you can without fear.

With best compliments.

Chop Hwa Hock & Co.
(Signed) Ong Cheng Toon.

It appears clear from that letter that plaintiff had some time previously written to Chop Hwa Hock & Co. in Rangoon about sending a consignment of coconuts to that firm in Rangoon. This letter is a reply thereto and is dated *9th October, 1947* and was presumably received by plaintiff a few days later. It does show that plaintiff had in mind the project of shipping coconuts to Rangoon and therefore supports his evidence as to buying coconuts during the first half of October, 1947 for that purpose. I therefore feel unable to accept Mr. Pooley's contention that the whole alleged scheme was merely a bogus scheme put up in conjunction with Tan Gie Chwan to defraud some of the partners in defendant firm. If such had been the case the said letter, Exhibit P. 13 would obviously have been in the forefront of the scheme, whereas its existence only came to the Court's notice by accident.

Mr. Pooley also urged that the plaintiff was unbelievably foolish in buying and husking his nuts before arranging for their transport. I have already stated that in my opinion he was stupid and extraordinarily unbusinesslike, but I felt that his evidence on the point, though somewhat ingenious, was true. He said :—

I first got the idea of exporting coconuts, etc. to Rangoon in October, 1947 — about 20 days before I signed the agreement chartering the boat. I got the idea because, if I could get the coconuts to Rangoon, I would get a good profit and could then purchase goods there and bring them back. I had often visited firms in Penang and it was there that I heard of successful trips. I have never been to Rangoon. The first thing I did (when I got the idea) was to look for motor-boat owners. One day I met Tan Gie Chwan of Defendant Company and discussed with him about hiring the motor-boat. He told me that his firm had a motor-boat for hire. I signed the charter about 2 or 3 days after that meeting.

I am of opinion that the plaintiff started on this "gamble" because he thought he could make a large profit. He had heard glowing reports of similar ventures and he tackled something that was altogether too big for him. It may well be that Tan Gie Chwan formed the idea of using plaintiff to get the vessel P. 2340 away to Rangoon in an attempt to defraud some of the partners in his firm. There is, however, no sufficient evidence that plaintiff knew of this or was a party to it. In the same way I think his "friend" misled him completely about the pepper transaction. But he did sign the charter-party and then the contract was broken.

The next point to consider is the liability of the partnership for what Tan Gie Chwan did.

The Penang partner who gave evidence (Seow Kah Cheng) stated that the partners in defendant firm were (1) Kok Hong Leong Kongsi, (2) Wan Tong Kongsi, (3) Huah Hock Kongsi, (4) Tan Teik Seng (the father of Tan Gie Chwan), (5) a kongsi in which he (Seow Kah Cheng), Ooi Geok Teck and Ch'ng Tean Seong were partners. Nos. 1, 2 and 3 were Rangoon firms, and Tan Teik Seng died on 25th September, 1947. According to Seow Kah Cheng, Tan Gie Chwan became cashier of the firm when his father fell ill some time after June, 1947. It was argued on behalf of the defendants (it is noteworthy that only Seow Kah Cheng and Ooi Geok Teck defended the Suit) (a) that the partnership was dissolved by the death of one of the partners Tan Teik Seng on 25th September, 1947 and (b) that Tan Gie Chwan had no authority to sign the charter-party.

On the other hand it is admitted that Tan Gie Chwan had taken over from Tan Teik Seng as cashier and he appears to have taken part in the sale of coconuts by plaintiff to the firm in September, 1947 before Tan Teik Seng's death. Seow Kah Cheng states that that sale was a genuine one but he says the coconuts were bought by Tan Poh Choo, the Manager. It is clear, however, that the cheques in that transaction, Exhibits P. 14 and P. 15 were signed by Tan Gie Chwan stamped with the firm's Chop, and it is also in evidence from the Mercantile Bank of India that Tan Gie Chwan was from 17th March, 1947 one of the two people who was permitted to sign cheques on behalf the the partnership. It seems clear then that Tan Gie Chwan was in fact holding an important position in the defendant firm. He was the son of Tan Teik Seng (a partner in the firm up to his death on 25th September, 1947); he had (according to the plaintiff) authority in sales and purchases; he was entitled to sign the firm's cheques and to use the firm's Chop. He had held this position before Tan Teik Seng's death and the plaintiff had no notice that his position or authority were altered after Tan Teik Seng's death. There seems to have been no noticeable difference in the way the firm carried on business after his death. As regards the outside world business was as before. I am of opinion that in the circumstances Tan Gie Chwan was held out to the plaintiff as having authority to act on behalf of the firm. Plaintiff did not know (or at least there is no evidence that he did know) until 23rd October, 1947 that the partners were in October, 1947 and even before having great trouble amongst themselves — trouble that on 22nd October, 1947 culminated in litigation. It may well be that Tan Gie Chwan did intend to deceive the partners and to get the P. 2340 away from Penang. He certainly left Penang for Rangoon before the end of October and has not since returned. But that probably fraudulent dealing, even if proved, does not affect plaintiff's position, unless he knew about it. And there is no evidence that he did know.

I therefore find that the defendant firm are liable for the breach of the contract signed with plaintiff on *21st October, 1947*.

It then becomes necessary to consider the damages caused to the plaintiff by reason of the breach of contract. Here the plaintiff is, as his Counsel had to admit, on very difficult ground.

The only damages claimed are for the loss incurred by the sale of the deteriorated nuts. The plaintiff started selling his nuts on *6th November, 1947* and sold them all according to his "Further Particulars" between 6th November, 1947 and 10th November, 1947 inclusive. It seems curious that 77,000 of them were sold at exactly the same price (6 cents per nut) but, even accepting the plaintiff's figures, it is difficult to ascertain what (if any) loss he has suffered by reason of the breach of the contract. According to Exhibit P. 13, the letter from Chop Huah (or Hwa) Hock — his intended consignees in Rangoon — the price to be expected there was 20 rupees per bag of 100 nuts less than plaintiff in his evidence stated that he anticipated. 20 rupees is more than the equivalent of $10, which was his expected profit per bag. Plaintiff produced no other evidence of the sale price of coconuts (good or bad) in Rangoon and there is in consequence no evidence before the Court that he would have made any profit. He stated in evidence, when pressed, that he thought the price would be more than 40 rupees per bag apparently because he had heard from other firms in Penang about the prices. There are also two other important factors to be taken into consideration; firstly that, even if plaintiff had shipped his nuts in the P. 2340 on (say) *22nd October, 1947* they would have arrived in Rangoon very little before November 6th — by which time they seemed to have been sadly deteriorated, according to his own evidence. He would therefore not have obtained in Rangoon the price of good nuts — whatever that was, a point on which there is, apart from Exhibit P. 13, no evidence. The second point is that according to the Burma Import Trade Control Regulations (Exhibit D. 1) the import of coconuts into Rangoon after 30th September, 1947 was prohibited (Clause 3), except in cases where irrevocable letters of credit had been opened or firm offers had been placed and accepted (Clause 4). Neither of these things had been done and plaintiff was apparently in ignorance of the said Regulations and was relying on the letter, Exhibit P. 13. It is not clear what "AP" (which was the English term used in that Chinese letter) means nor does it appear certain that it would overcome the difficulties raised by Clauses 3 and 4 (of the Regulations) referred to above. It is noteworthy that the export of coconuts from Penang to Rangoon (see Mr. Sim's evidence and Exhibit P. 20) almost ceased after *3rd October, 1947*. Mr. Sim (P.W. 5) is a Senior Customs Officer, Penang, and supplied the figures given in Exhibit P. 20. Mr. Pooley also made the

point that the P. 2340 was not large enough to hold 80,000 nuts, and he pointed out that plaintiff could have sent his coconuts to Rangoon in a ship which left Penang for that port on *October 29th, 1947* at a freight of $2 per bag whereas plaintiff apparently estimated his cost of transport in the P. 2340 at more than that. The plaintiff stated that he did not make inquiries about sending his nuts by steamer because he had hoped to make a profit bringing goods from Rangoon on the return trip and he had already hired the motor-boat. He had also paid $3,000 in advance.

I am forced to the conclusion that the plaintiff was totally unfit to carry out the project upon which he embarked (as "rather a gamble"), and I do not think he has proved that he is entitled to any substantial damages. No figures have been put before me on which I can exercise any legal basis of assessment of damages, and I do not think it would be right for me to make a pure "shot" or "guess". It appears even possible that he would have actually lost if the trip had been carried out, but that, again, is mere guesswork. I find myself in much the same position as was Jelf J. in *Sapwell v. Bass*[1]. That case, though quite different in its facts, was an action for damages for breach of contract, and the learned Judge, being quite unable to assess damages on any legal basis, gave judgment for the plaintiff for nominal damages of 1 shilling.

In the present case I feel myself in a somewhat similar position, and accordingly I give judgment for the plaintiff for nominal damages of $1.

Lastly the question of costs arises. The plaintiff has sued for damages for breach of contract but has failed to prove any substantial damages. In some cases I should in such event feel inclined to award to defendants their costs but in this case they have failed on the other issues (which took up a great deal of time in Court) and have only succeeded on the damages question. They have alleged but not proved fraud on the part of the plaintiff and want of ostensible authority on the part of their own agent. The defendant firm from 22nd October, 1947 have had, as stated above, very active disagreements and internal troubles amongst themselves, and it is largely, if not entirely, because of those that this action arose. I am of opinion that this case is governed as regards costs by considerations similar to those in *Sapwell v. Bass*[1], cited above.

I think therefore that justice will be done in the peculiar circumstances of this case by ordering each party to pay his own costs.

Order accordingly.

CHOW E WA (f) v. REGISTRAR OF TITLES & ORS.

[C. A. (Willan C.J., Spenser Wilkinson and Storr JJ.) December 23, 1948]

[K. L. — F.M. Civil Appeal No. 39 of 1948]

Land Code (Cap 138), ss. 78, 174, 175 and 283 — Order of Court — Whether registering authority has discretion to register Order of Court — Time and date of memorial — Interpretation by reference to foreign law.

The question raised in this appeal was whether the Registrar of Titles has a discretion to refuse to register an Order of Court giving extension of time to a caveat, after Registrar of Titles had made a memorial on register discharging the caveat.

Held: s. 174 of the Land Code gave the proper registering authority no option and that in this case the Registrar of Titles should have registered the Order of Court and if, after registering it, he was doubtful as to its effect, he should have referred the question to a Court for a ruling.

In view of section 78 of the Land Code all orders of Court should be noted on the presentation book, otherwise there is no record of the time and date when they were presented. To ignore the provision of that section with regard to orders of Court might lead to grave difficulties if an order of Court and a charge of transfer were presented on the same day at about the same time.

To attempt to construe the local Land Code by reference to decisions under a foreign land law which is not in *pari materia* with our local Land Code, is dangerous, not only because we do not know in what respects the other laws of the foreign country — e.g. their Interpretation Act — may differ from our local law.

Cases referred to :—

(1) *Collector of Land Revenue v. Chong Loke Chong & Anor.* 3 F.M.S.L.R. 60.

(2) *In re the Registration of Caveat* (1908) Innes 114.

(3) *Loke Yew v. The Port Swettenham Rubber Co.* (1912) Innes 202 at p. 212 — 213.

(4) *Collector of Land Revenue v. Tan Toh & Anor.* (1933-34) F.M.S.L.R. 135.

(5) *Thiagaraja Bhagavathar v. King-Emperor* 74 I.A. 132 at p. 141.

CIVIL APPEAL.

R. Ramani for the appellant.

E. N. Griffith-Jones for the Registrar of Titles, Selangor (1st respondent).

C. Mills for the Hongkong and Shanghai Banking Corporation (2nd respondent).

W. G. W. Hastings for Loke Yong Hong (3rd respondent).

The judgment of the Court below was as follows :—

Briggs J. : —This is a reference by the Registrar of Titles, Selangor, under section 238 of the Land Code. Chow E Wa (f) is the proprietress of the land held under Selangor Grant for Land No. 703 and Selangor Certificate of Title No. 1801. On the 12th June, 1948, an absolute caveat was lodged against this land by Loke Yung Hong, who claimed that the